

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CLAUDE MAYO CONSTRUCTION)
COMPANY, INC.,)
))
Plaintiff,)
))
v.) **No. 15-1263C**
) **(Judge Kaplan)**
THE UNITED STATES,)
))
Defendant.)

JOINT MOTION TO MODIFY May 18, 2018 SCHEDULING ORDER

Pursuant to Rules 6(b)(1) and 6.1 of the United States Court of Federal Claims (RCFC), plaintiff, Claude Mayo Construction Company, Inc. (CMCC), and defendant, the United States (the parties), jointly respectfully request that the Court modify its May 18, 2018, scheduling order (Dkt. No. 38) to grant the parties additional time to complete discovery pursuant to the schedule proposed in the table below. Fact discovery is currently scheduled to close on November 30, 2018, with expert discovery to close June 17, 2019, and a joint status report regarding further proceedings due by July 1, 2019. This is the parties' second request for a modification of the schedule.

We respectfully submit that good cause exists for the requested schedule modification. In accordance with the Court's prior scheduling orders, the parties exchanged initial disclosures in the fall of 2017, identifying numerous potential witnesses. The parties subsequently propounded written discovery requests on one another, including documents demands and interrogatories in the winter of 2017 and spring of 2018. As a result of those demands, the parties produced tens of thousands of pages of documents relating to the construction project at issue in this matter (Plaintiff produced approximately 45,000 pages and the Government produced approximately 110,000 pages of documents). Due to the volume of documents produced, it took additional time before the parties were prepared to proceed with depositions.

Ultimately, the parties did conduct depositions of two key witnesses, a government contracting officer (Charles Ferro) and a project managers (Erin Bishop), in Syracuse, New York on October 10 and 11, 2018. In addition to the principal of the Plaintiff (Claude Mayo), the parties have identified at least two other party witnesses (another contracting officer who was significantly involved in the project (David Bullard) and the government's subcontracted construction quality manager (Don Davidson)) as well as four non-parties that they intend to depose (several of the subcontractors that were involved in the project and a representative of the general contractor that took over the project after Plaintiff was terminated).

The parties' ability to schedule these additional depositions in the near term has been hampered by a number of factors. Initially, most of these witnesses are located in different locations, e.g., Mr. Mayo is in Buffalo, New York, Mr. Bullard is in North Carolina, Mr. Davidson is located in Georgia, the subcontractors and replacement general contractor are in either Syracuse or Buffalo. Due to the varied locations of the witnesses in combination with the upcoming holiday season and limitations on availability associated with holiday travel/vacations/commitments, attempting to schedule these depositions has proven to be very difficult.

Additionally, the availability of counsel for the parties has been limited by other commitments. Counsel for CMCC has been occupied with, most significantly, ongoing discovery in a commercial arbitration matter (*Day & Zimmermann Lone Star, LLC v. Combined Systems, Inc.*, AAA Case No. 01-16-0002-9882) involving \$20 million in claims, which has included documents productions in excess of 300,000 pages and which has hearings scheduled in November, as well as a state court trial scheduled to begin the first week of December (*Kershaw and Barnes v. Niagara Mohawk Power Corp., et al.*, New York State Supreme Court Index No. 806920/2015). Government counsel's availability has similarly been limited due to other

matters, including briefing and preparing to argue a bid protest, *RMGS, Inc. v. United States*, No. 18-1260 (Fed. Cl.); preparing a large document production in *TMG Services, Inc. v. United States*, No. 17-1725 (Fed. Cl.); assisting with the drafting of an opposition to a petition for *certiorari* in *Securiforce Int'l. Amer., LLC v. United States*, No. 18-37 (U.S. Sup. Ct.); negotiating the terms of a joint motion for conditional certification in an FLSA collective action as well as the terms of the related notice to impacted employees in *Loftis, et al. v. United States*, No. 18-102 (Fed. Cl.); responding to a Court order regarding a pending motion to dismiss in *Digital Media Company v. United States*, No. 18-671 (Fed. Cl.); and handling oral argument in another protest, *Dynanet Corp. v. United States*, No. 18-795 (Fed. Cl.).

Due to the need to complete the remaining depositions, all of which will require travel by either one or both counsel, counsel for the parties believe that an enlargement of the schedule is necessary. Counsel have worked diligently to schedule the remaining depositions in January/February once the holiday season has passed and availability (of both the witnesses and counsel) is more open, and have come up with the following plans: Mr. Davidson's deposition has been scheduled for January 4, 2019 in Atlanta, Georgia; Mr. Bullard's deposition has been scheduled for January 24, 2019, in Durham, North Carolina; and, the week of February 4-8, 2019 has been set aside for the depositions of Mr. Mayo as well as four non-party witnesses (representatives of subcontractors TAG Mechanical, Weydman Electric, and Commercial Door Company as well as a representative of the replacement contractor, SJ Thomas) in Syracuse, New York.

Granting this joint request for enlargement will not cause any material inconvenience or prejudice. Accordingly, the parties respectfully propose that the Court adopt the following modified schedule for discovery in this case:

Close of fact discovery (incl. exchange of documents, depositions)	April 1, 2019
Designation of expert witnesses, if any	May 3, 2019
Plaintiff's expert(s) report due, if any	June 3, 2019
Defendant's expert(s) report due, if any	August 5, 2019
Close of expert discovery (incl. depositions)	October 4, 2019
Parties file joint status report as to how case will proceed (incl. proposed schedule for Rule 56 motion(s) if desired)	October 18, 2019

For the foregoing reasons, and, as set forth in detail above, the parties respectfully request that the Court grant our joint request for modification of the scheduling order.

Respectfully submitted,
November 16, 2018

s/ Nicholas J. DiCesare
NICHOLAS J. DICESARE
Partner
BARCLAY DAMON LLP
The Avant Building
200 Delaware Avenue
Suite 1200
Buffalo, NY 14202
Tel: (716) 566-1524
Fax: (716) 566-4069
Email: NDiCesare@barclaydamon.com

Attorneys for Plaintiff

JOSEPH H. HUNT
Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

s/ Martin F. Hockey
MARTIN F. HOCKEY
Deputy Director

s/ Russell J. Upton
RUSSELL J. UPTON
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 305-3634
Fax: (202) 514-7965
Email: Russell.J.Upton@usdoj.gov

OF COUNSEL

JUSTIN HAWKINS
Assistant General Counsel
Office of the General Counsel
General Services Administration
1800 F Street, N.W.
Washington, D.C. 20405
Tel: (202) 969-7066
Fax: (202) 501-1944
Email: justin.hawkins@gsa.gov

Attorneys for Defendant